

From: Greg Dalen
To: Microsoft ATR,microsoftcomments@doj.ca.gov@inetgw,...
Date: 11/28/01 4:15pm
Subject: Microsoft Settlement

[Text body exceeds maximum size of message body (8192 bytes). It has been converted to attachment.]

Subject: Microsoft Settlement

TO: US Department of Justice-Microsoft anti-trust comments:
microsoft.atr@usdoj.gov

I've just read the news on the proposed one billion dollar settlement.

As I understand the deal, this seems to me to be very much in favor of Microsoft. In addition to few to no changes to their behavior, a portion of the punishment is, in fact, a real benefit to them. The resolution including the dissemination of their software and compatible hardware, training to use their products, and loads of their often bundled software, seems to fly in the face of the very point of the trial.

They have been found guilty of using illegal means to maintain their monopoly. As I understand it, one of the intents of the Anti-Trust laws is to prevent illegal monopolists from abusing their position in the future. How would the proposed settlement do that when a good portion of the settlement specifically increases their market share of both the OS and their bundled products?

The proposed settlement uses a blatant play on sentimentality in an effort to escape unscathed (and in fact strengthened by) their conviction as illegal monopolists.

In the past there has been strong resistance to punish illegal monopolists for fear of the effects on the economy. I am not aware of a single case where the strongest possible punishments have been imposed, that have not resulted in benefit to consumers, competitors and the economy at large.

I believe this settlement should be declined. Microsoft and not the Schools or justice will be the only beneficiary. The settlement should be made in order to change their behavior, this does nothing to address their behavior and will not change it in the future, allowing them to continue to further maintain their illegal monopoly.

Greg Dalen

CC to:
California: microsoftcomments@doj.ca.gov
Connecticut: attorney.general@po.state.ct.us
Florida: ag@oag.state.fl.us
Iowa: webteam@ag.state.ia.us
Kansas: GENERAL@ksag.org
Massachusetts: tom.reilly@ago.state.ma.us
Minnesota: attorney.general@state.mn.us
Utah: uag@att.state.ut.us
West Virginia: consumer@mail.wvnet.edu

=====
ZDNet Article on the settlement

MTC-00002375_0002

=====

Judge to rule over Microsoft's motives
Monday 26th, November 2001
Reuters

A hearing begins Tuesday to determine if Microsoft playing Santa for needy kids with its billion-dollar settlement offer - or the Grinch looking to dominate the education market

Is Microsoft a do-gooder, or up to no good? That's the question a federal judge in Baltimore will consider on Tuesday at a hearing on the company's billion-dollar antitrust settlement of private, class-action lawsuits.

US District Judge J. Frederick Motz will have to decide whether the settlement proposed by the company is a creative solution that will put computers in the hands of poor school children or a legal ruse that will further the company's dominant position in the computer business.

Microsoft says the private settlement is a civic-minded way to resolve more than 100 lawsuits filed around the country on behalf of customers allegedly overcharged by the company.

Under the settlement, Microsoft would make amends by spending more than \$1bn to put software and computers into some of the poorest US schools. It would assist more than 12,500 schools serving nearly 7 million children under the settlement of the private suits.

"It is a settlement that avoids long and costly litigation for the company and at the same time... really makes a difference in the lives of millions of school children in some of the most economically disadvantaged schools in the country," Microsoft Chief Executive Steve Ballmer told reporters last week.

Different path

But at Tuesday's hearing, some class-action attorneys from California are expected to paint quite a different picture for Motz.

The dissenting attorneys, who have filed a case on behalf of California consumers, will ask Motz to strike down the settlement or allow their lawsuits to proceed separately in California.

They portray the settlement negotiated by Microsoft and the other class-action attorneys as a ploy designed to entrench the Windows monopoly while allowing the company to pay back only a tiny fraction of what it actually owes consumers.

Central to the dispute is a US antitrust doctrine that holds that only a "direct purchaser" can collect damages in private antitrust suits.

The direct purchaser restriction applies nationwide, except in the more than a dozen states like California that have passed laws repealing it, said Gene Crew, an antitrust attorney heading one of the cases against Microsoft on behalf of California consumers.

In February, Motz ruled that in states that had not passed the so-called "repealer" statutes, antitrust litigants could not recover damages from the company. That's because most consumers do not get Microsoft's Windows software directly from the company, but pre loaded onto a machine they buy from a computer manufacturer.

The cases in California and a handful of other repealer states, meanwhile, have been moving forward. The California case is scheduled to go to trial

next August.

California attorneys dissenting from the settlement are accusing Microsoft of singling out the attorneys in nonrepealer states -- those with the weakest cases--and secretly negotiating a sweetheart deal for the company.

The dissenters fear such a settlement could neutralize cases like theirs in repealer states, which they say still hold the potential for larger damage awards against Microsoft.

"It was a clever tactic... whereby they hijack the California case and use it to lend value to meritless cases elsewhere," Crew said.

However, the settling attorneys will tell Motz the settlement is a better deal for consumers than trying to divvy up money among individuals. Michael Hausfeld, one of the lawyers who negotiated the settlement, said consumers would have gotten as little as \$10 apiece if Microsoft had agreed to reimburse them directly.

"This was a very carefully thought-out plan," Hausfeld said. "There's a lot of complaining out there, and there's no relationship between the complaining and reality."

Hausfeld said Crew had vastly over-estimated the amount of money that can be recovered from Microsoft. And he scoffed at the idea that Microsoft had singled out the weakest plaintiffs for settlement talks.

"Nobody pays over \$1bn to the weak link," Hausfeld said.

The five-year program would settle class-action claims that Microsoft abused its monopoly over personal computer operating systems and overcharged millions of people for software.

Microsoft said it would take a \$550m charge before taxes against earnings in the current fiscal quarter if the pact is approved by the court. Earlier this month, the software giant agreed to settle its separate, three-year case with the Justice Department and many of the state attorneys general who had sued the company.

The smell test

At Tuesday's hearing, dissenters from the private antitrust settlement will run through a list of legal objections to the deal, Crew said.

Crew said the private antitrust settlement is worth only a fraction of the amount Microsoft might end up owing to consumers. He estimates that in California alone, overcharges may total \$3bn to \$9bn.

"Right there it flunks the smell test," Crew said. "It makes the settlement look silly."

Crew argued that the settlement deal is actually a "marketing device" that "allows them to further entrench their monopoly" by spreading free Microsoft software into primary and secondary schools.

"I think charity is great," Crew said. "But they should do it as a matter of charity, not a matter of settling a lawsuit."

Ballmer has denied the settlement is aimed at boosting the company's market share in American schools. He said money from the settlement can be used to buy software from Microsoft competitors.

Think it's all over? The antitrust case against Microsoft can still go back the to Court of Appeals, and then there's the European Commission's investigation...